

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN DAULTON

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Carrier

Docket No. **1,038,284**

ORDER

Self-insured respondent requests review of the August 4, 2010 Award by Administrative Law Judge Marcia Yates Roberts. The Board heard oral argument on January 21, 2011. The Division's Acting Director Seth Valerius appointed Thomas D. Arnhold of Hutchinson, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its self-insurance fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant suffered four discrete work-related accidental injuries while working for respondent. The parties were unable to agree on the nature and extent of her disability. Claimant argued she was entitled to a work disability and respondent contended she

should be limited to her functional impairment as her only permanent restrictions were due to her shoulder injury.

The Administrative Law Judge (ALJ) awarded claimant an 80 percent work disability based upon a 100 percent wage loss and a 60 percent task loss.

Respondent requests review of the nature and extent of disability. Respondent argues claimant's task loss as well as her loss of employment with respondent were solely because of the permanent restrictions for her scheduled left upper extremity injuries and not due to her neck injury. As such respondent argues this precludes claimant from receiving a work disability award.

Claimant notes that she injured both her neck and left upper extremity in the last accident. Consequently, claimant argues she is entitled to compensation under K.S.A. 44-510e for the combination of injuries. The restrictions imposed are applicable to determine her work disability whether the restrictions focused on the scheduled injury or whole person injury. In addition, claimant argues that there does not need to be a nexus between the injury and the wage loss. Accordingly, claimant further argues she is entitled to a work disability because she suffered a whole person injury, lost her job and is now making less than 90 percent of her pre-injury wage. Consequently, claimant requests the Board to affirm the ALJ's Award.

The sole issue raised on review before the Board is the nature and extent of claimant's disability, including whether she is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant had problems with her low back in 2003 or 2004 before the accidents which are the subject of this claim. She was treated by Dr. Charles Striebinger. The doctor performed surgery on her low back in September 2004. Claimant testified that she was released without restrictions and did not require any medications or ongoing treatment. She further testified that she was able to work and could perform all of her daily-living activities.

Claimant had to take a pre-employment physical before starting work with respondent. She passed the examination and was hired as a mental health technician. Her job required her to restrict unruly patients on an occasional basis. Claimant was able to restrict the patients without any problems with her low back until after her multiple work-related accidental injuries.

Claimant began work as a mental health technician for respondent on May 18, 2005. It is undisputed she suffered accidental injuries that occurred on March 13, 2006; December 20, 2006; June 1, 2007; and August 19, 2007.

The March 13, 2006 accident occurred when claimant was lifting a patient from a vehicle to a wheelchair. Claimant injured her left shoulder, mid back and head. She received conservative care including medications and electrical stimulation and heat to the left neck and shoulder. Claimant continued working at her regular job duties.

The December 20, 2006 accident occurred when claimant was again lifting a patient. Claimant again injured her left shoulder, mid back and neck. Dr. S. Hamid Alhosseini provided treatment which consisted of medications as well as physical therapy for the neck and shoulder. She missed a few days of work but after treatment her symptoms improved and she returned to her regular job duties.

The June 1, 2007 accident occurred when claimant interceded in an altercation between a patient and a co-worker. Claimant injured her back and left leg. She returned to Dr. Alhosseini for treatment.

The August 19, 2007 accident occurred when claimant was helping a co-worker lift a 320-pound patient. Claimant injured her neck, shoulders and left arm. Claimant again sought treatment with Dr. Alhosseini. In March 2008 claimant was seen by Dr. Paul Nassab for an evaluation of her continuing left shoulder complaints. An MRI of claimant's shoulder was performed and claimant underwent steroid injections in her shoulder on two occasions as well as physical therapy. But the symptoms persisted and on September 4, 2008, Dr. Nassab performed an arthroscopic decompression and debridement on claimant's left shoulder.

In November 2008 claimant noted worsening of her neck and cervical spine complaints especially during physical therapy for her shoulder. Claimant received treatment for her cervical spine from Dr. Ann Lee who prescribed medications, physical therapy and referred claimant to Dr. Joseph Danda for three epidural steroid injections. The radiculopathy from the neck was relieved from the steroid injections and Dr. Lee released claimant to full-duty work in February 2009.

Claimant continued to experience pain in her left upper extremity and left hand. Ultimately, Dr. Nassab performed a carpal tunnel release on claimant's left wrist in March 2009. Dr. Nassab released claimant to return to work with a 10-pound lifting limit, no overhead work and no confrontational work. Respondent could not accommodate claimant's restrictions and her employment was terminated May 15, 2009.

Claimant testified that she still has neck complaints which she described as tightness and stiffness. Claimant noted that the steroid injections provided relief from her

neck symptoms but that her neck condition had worsened and at the time of regular hearing was as bad as it was before the injections. Claimant further testified that her left shoulder hurts and she has range of motion problems such as difficulty rolling up a car window. Although claimant was seeking employment at the time of the regular hearing she had not been able to find employment.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined and evaluated claimant on March 2, 2009, at her attorney's request. The doctor obtained a history from claimant and also reviewed medical records. Upon physical examination of claimant's cervical spine and left upper extremity, the doctor found mild tenderness of the paraspinal muscles, mild to moderate weakness of flexion and abduction and moderate weakness of the supraspinatus and of external rotation, pain with the crossover maneuver, and positive flexion compression of the ulnar and median nerve testing. Cervical spine x-rays revealed significant degenerative disc disease at C5-6 and left shoulder x-ray revealed demineralization of the greater tuberosity.

Based on the AMA *Guides*¹, Dr. Prostic rated claimant's cervical spine at 10 percent, 15 percent to the left upper extremity for residuals and shoulder difficulties and 10 percent left upper extremity for median and ulnar nerve entrapment. The doctor opined that claimant's restrictions should be the same as what Dr. Nassab had recommended. Those restrictions being no lifting greater than 10 pounds and avoid over the shoulder use of her left arm as well as avoid restraining patients. Dr. Prostic opined claimant may need additional treatment for her shoulder. Dr. Prostic was unable to apportion the impairment ratings among the various accidents. But claimant's permanent restrictions were all attributable to the last date of accident on August 19, 2007.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 6 of the 10 tasks for a 60 percent task loss. Dr. Prostic attributed claimant's task loss to her cervical spine and her shoulder complaints. Dr. Prostic testified:

Q. One question I've got is: If she was able to work performing full duty up until May of 2008, how is it that suddenly in June she's got this huge task loss?

A. The two reasons that I would suggest are that she had a progressive problem in her cervical spine and that she has not responded as well to the shoulder surgery as Dr. Nassab would like.²

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Prostic Depo. at 23-24.

On cross-examination, Dr. Prostic opined that claimant's impairment ratings and restrictions were due to the accidental injury on August 19, 2007. And when explaining his rating, Dr. Prostic was shown Dr. Danda's medical records which revealed an EMG had indicated claimant had cervical radiculopathy. Dr. Prostic testified that when he examined claimant he thought the radiculopathy had been alleviated by the steroid injections but based upon the EMG findings claimant would qualify under the Cervicothoracic DRE Category III for a 15 percent rating.

Dr. John Gilbert, board certified in orthopedic surgery and independent medical evaluation, examined and evaluated claimant on May 12, 2010, at respondent's attorney's request. The doctor reviewed claimant's medical records and also took her history. X-rays of claimant's cervical and lumbar spine as well as the shoulder were taken. The cervical spine x-rays revealed a focal disc space narrowing and osteophyte formation at the C5-6 intervertebral disc space. Lumbar spine x-rays revealed no perceptible motion at the L4-5 or L5-S1 disc spaces. Xrays of the left shoulder revealed minor degenerative change in the acromioclavicular joint. Upon physical examination, Dr. Gilbert diagnosed claimant as having cervical spondylosis with chronic cervical strain, rotator cuff tendinitis and chronic impingement in the left shoulder with a fair result following rotator cuff debridement and decompression, left carpal tunnel syndrome with status post left carpal tunnel release, and lumbar spondylosis with mechanical back pain with status post lumbar fusion. At the time of his examination, the doctor opined claimant was at maximum medical improvement.

Based upon the *AMA Guides*³, Dr. Gilbert placed claimant in the DRE Cervicothoracic Category II for a 5 percent impairment due to degenerative changes noted in the cervical spine. But Dr. Gilbert opined that 2.5 percent is attributable to preexisting degenerative change and he concluded that as a result of her work related injuries claimant suffered an additional 2.5 percent impairment which he rounded up to 3 percent. Dr. Gilbert also found an impairment to claimant's lumbar spine of 2 percent but also opined she had a 20 percent preexisting impairment. He further found claimant had a 10 percent impairment to her left upper extremity due to an 8 percent range of motion loss and 2 percent to her wrist for range of motion loss.

Dr. Gilbert testified that he had no objections to the permanent restrictions that Dr. Nassab had imposed on claimant of no lifting greater than 10 pounds, no overhead work on the left upper extremity and no confrontational work.

On cross-examination Dr. Gilbert agreed that when he examined claimant she had cervical pain radiating into her left upper extremity. And the doctor agreed that if he

³ Claimant's brief contained an objection that Dr. Gilbert's ratings were not based upon the Fourth Edition of the *AMA Guides*. But Dr. Gilbert's May 12, 2010 report, introduced at his deposition without objection, states his ratings were pursuant to that edition of the *AMA Guides*.

considered the cervical radiculopathy under the Guides claimant's cervical rating would be 15 percent.

Michael Dreiling, a vocational rehabilitation counselor, conducted a personal interview with claimant on August 9, 2009, at the request of claimant's attorney. He prepared a task list of 10 nonduplicative tasks claimant performed in the 15-year period before her injury.

In *Bryant*⁴, the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Each of claimant's accidents resulted in injury to a scheduled member and to a nonscheduled portion of her body. As previously noted, both Drs. Prostic and Gilbert provided permanent impairment ratings to claimant's cervical spine as well as her left upper extremity. Consequently, claimant is entitled to compensation based upon K.S.A. 44-510e.

Initially, it should be noted that the ALJ adopted Dr. Prostic's functional impairment rating. Likewise, the Board finds Dr. Prostic's ratings more persuasive than Dr. Gilbert's in this case. However, the Board notes that both physicians agreed that cervical radiculopathy would place claimant in DRE Cervicothoracic III for a 15 percent impairment. At his deposition, Dr. Prostic was provided a report from Dr. Danda which noted EMG testing had revealed that claimant had such cervical radiculopathy. At that point Dr. Prostic noted such an objective finding would warrant a 15 percent cervical rating. On cross-examination, Dr. Gilbert agreed that Dr. Danda's report was provided to him and that when he examined claimant she had complained of pain radiating from her neck into her shoulder and that cervical radiculopathy would warrant a 15 percent cervical rating. Based upon the entire evidentiary record, the Board finds the claimant's cervical rating should be increased to 15 percent. And combining and converting Dr. Prostic's left upper extremity ratings to a whole person rating and using the combined values chart of the AMA *Guides* results in a 27 percent whole person permanent partial functional impairment.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

⁴ *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Respondent argues claimant is not entitled to a work disability analysis because her permanent restrictions were due to her scheduled shoulder injury. The Board disagrees. As previously noted, the Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.⁵

As a result of her last accidental injury on August 19, 2007, claimant injured her neck and left upper extremity. Both Drs. Gilbert and Prostic provided permanent impairment ratings for claimant's nonscheduled portion of the body (cervical spine) and to scheduled members (left upper extremity). Consequently, claimant is entitled to compensation pursuant to K.S.A. 44-510e. Likewise the restrictions imposed as a result of the injuries, whether for the scheduled member or the nonscheduled portion of the body, would also be combined and utilized to determine the task loss pursuant to K.S.A. 44-510e.

At the time of the regular hearing, claimant had neither worked nor found employment after she was terminated from her employment with respondent. Consequently, she is entitled to a work disability analysis. Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. The only task loss opinion was provided by Dr. Prostic who reviewed the task list prepared by Michael Dreiling and opined claimant would be unable to perform 6 out of the 10 tasks for a 60 percent task loss. As claimant was unemployed at the time of the regular hearing she has a 100 percent wage loss. Averaging the task and wage losses

⁵ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986). See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

results in an 80 percent work disability. The ALJ's determination that claimant is entitled to compensation for an 80 percent work disability is affirmed.

Finally, Dr. Gilbert stated he could not apportion his ratings among the accidents and Dr. Prostic agreed but further stated that he attributed claimant's permanent impairment and restrictions to the last accidental injury on August 19, 2007. And at regular hearing the claimant agreed she was seeking a work disability for injuries to her cervical spine and left upper extremity.⁶ Based on this evidentiary record the Board concludes that claimant's permanent impairment and restrictions were the result of the August 19, 2007 work related injury and that date will be used for calculation of the compensation due claimant.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated August 4, 2010, is modified to reflect that claimant suffered a 15 percent cervical impairment and affirmed in all other respects.

IT IS SO ORDERED.

Dated this 28th day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Marcia Yates Roberts, Administrative Law Judge

⁶ R.H. Trans. at 4-5.